

LIST OF AMENDMENTS TO THE CALIFORNIA RULES OF COURT

Adopted by the Judicial Council of California on April 23, 2004

Effective July 1, 2004

and

Corrections to two Rule Histories*

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PART VI. Appeals in Noncapital Criminal Cases

Title One, Appellate Rules—Division I, Rules Relating to the Supreme Court and Courts of Appeal—Chapter 1, Rules on Appeal—Part VI, Appeals in Noncapital Criminal Cases, amended effective ~~January~~ July 1, 2004.

Rule 14. Contents and form of briefs

(a) ***

(b) Form

(1)–(9) ***

(10) The cover, preferably of recycled stock, must be in the color prescribed by rule ~~44.5(e)~~ 44(c) and must state:

(A) the title of the brief;

(B) the title, trial court number, and Court of Appeal number of the case;

(C) the names of the trial court and each participating trial judge;

(D) the name, address, telephone number, and California State Bar number of each attorney filing or joining in the brief, but the cover need not state the bar number of any supervisor of the attorney responsible for the brief; and

(E) the name of the party that each attorney on the brief represents.

(11) ***

(Subd (b) amended effective July 1, 2004; previously amended effective January 1, 2004.)

(c)–(e) ***

Rule 14 amended effective July 1, 2004; repealed and adopted effective January 1, 2002; previously amended effective January 1, 2004.

Rule 28. Petition for review

(a)–(f) ***

(g) Amicus curiae letters

- (1) Any person or entity wanting to support or oppose a petition for review or for an original writ must serve on all parties and send to the Supreme Court an amicus curiae letter rather than a brief.
- (2) The letter must describe the interest of the amicus curiae. Any matter attached to the letter or incorporated by reference must comply with rule 28.1~~(f)~~(e).
- (3) Receipt of the letter does not constitute leave to file an amicus curiae brief on the merits under rule 29.1(f).

(Subd (g) amended effective July 1, 2004.)

Rule 28 amended effective July 1, 2004; repealed and adopted effective January 1, 2003; previously amended effective January 1, 2004.

Rule 31.1. Application in superior court for addition to normal record

(a)–(d) ***

Advisory Committee Comment (2004)

Revised rule 31.1 is former rule 33(b).

Subdivision (b). Former rule 33(b) described the application for additional record as both an “application” and a “request” for an order. For internal consistency and consistency with the style of these rules, revised rule 31.1 uses only the term “application.” The change is not substantive.

Former rule 33(b)(3) provided for the transmission to the reviewing court of exhibits not requested by that court. Revised rule ~~31.1(e)~~ 31(e) now governs the transmission of exhibits.

Subdivisions (c) and (d). Former rule 33(b) required the clerk, when a request for additional record was filed, to *immediately* present it to the judge “and notify the reporter.” But because the reporter had no duty to prepare any additional transcript unless the judge granted the request or failed to act on it within five days, the notification was premature. In a substantive change, subdivision (c)(3) of revised rule 31.1 deletes the requirement of immediate notification, and subdivision (d)(3) instead directs the clerk to notify the reporter when and if additions to the transcript are needed.

Rule 39.1. Special rule for dependency and freedom from custody appeals

(a)–(c) ***

- (d) [Copies of briefs]** Notwithstanding rules ~~16(e), 37(a)~~ 33(d)(1) and 44.5, the parties must not serve briefs on the Attorney General or the district attorney unless that office represents a party. If the Court of Appeal has appointed appellate counsel for any party, the county child welfare department must serve two copies of its briefs on that counsel and one copy of its briefs on the appellate project for the district, if applicable.

(Subd (d) amended effective July 1, 2004; previously amended effective January 1, 2004.)

(e)–(f) ***

Rule 39.1 amended effective July 1, 2004; adopted effective July 1, 1987; previously amended effective January 1, 1992, January 1, 1994, January 1, 1995, January 1, 2001, and January 1, 2004.

Rule 44.5. Service on public officer or agency

(a) Service on the Attorney General

In addition to any statutory requirements for service of briefs on public officers or agencies, a party must serve its brief or petition on the Attorney General if the brief or petition:

- (1) questions the constitutionality of a state statute; or
- (2) is filed on behalf of the State of California, a county, or an officer whom the Attorney General may lawfully represent in:
 - (A) a criminal case;
 - (B) a case in which the state or a state officer in his or her official capacity is a party; ~~and~~ or
 - (C) a case in which a county is a party, unless the county's interest conflicts with that of the state or a state officer in his or her official capacity.

(Subd (a) amended effective July 1, 2004.)

(b)–(c) ***

Rule 44.5 amended effective July 1, 2004; adopted effective January 1, 2004.

Rule 212. Case management conference; meet-and-confer requirement; and case management order

- (a) [Initial case management review]** In every general civil case except complex cases and cases exempted under rules 207(c)–(d), 209~~(d)–(e)~~ (c)–(d), 214, and 243.8, the court must review the case no later than 180 days after the filing of the initial complaint.

(Subd (a) amended effective July 1, 2004; adopted effective July 1, 2002; previously amended effective January 1, 2004.)

(b)–(k) ***

Rule 212 amended effective July 1, 2004; adopted effective January 1, 1985; previously amended effective January 1, 1995, July 1, 1999, January 1, 2000, January 1, 2001, July 1, 2002, and January 1, 2004.

Rule 892. Assessing fee for official reporter

The half-day fee to be charged under Government Code section 68086 ~~when the court provides verbatim recordkeeping services~~ for the services of an official reporter must be established by the trial court as follows: for a proceeding or portion of a proceeding in which a certified shorthand reporter is used, the fee is equal to the average salary and benefit costs of the reporter, plus indirect costs up to 18 percent of salary and benefits. For purposes of this rule, the daily salary is determined by dividing the average annual salary of temporary and full-time reporters by 225 workdays.

(Subd (a) amended and unlettered effective January 1, 2004.)

Rule 892 amended effective July 1, 2004; adopted effective January 1, 1994; previously amended effective January 31, 1997, August 17, 2003, and January 1, 2004.

Rule 982.9. Computer-generated or typewritten forms for proof of service of summons and complaint

- (a) [Computer-generated or typewritten forms; conditions]** Notwithstanding the adoption of mandatory form *Proof of Summons* (form POS-010), a form for proof of service of a summons and complaint prepared entirely by word

processor, typewriter, or similar process may be used for proof of service in any applicable action or proceeding if the following conditions are met:

(1) ***

(2) The left, right, and bottom margins of the proof of service must be at least one-half inch. The top margin must be at least three-quarters of an inch. The typeface must be Times, Courier, Arial, or an equivalent ~~roman~~ typeface not smaller than ~~12~~ 9 points. Text must be single-spaced, and a blank line must precede each main numbered item.

(3)–(9) ***

(Subd (a) amended effective July 1, 2004; previously amended effective July 1, 1985, January 1, 1986, January 1, 1987, July 1, 1999, and January 1, 2004.)

(b) ***

Rule 982.9 amended effective July 1, 2004; previously amended effective January 1, 1989, July 1, 1999, and January 1, 2004.

Rule 1606. Disqualification for conflict of interest

(a) [Arbitrator's duty to disqualify himself or herself] The arbitrator must determine whether any cause exists for disqualification upon any of the grounds set forth in section 170.1 of the Code of Civil Procedure governing the disqualification of judges. If any member of the arbitrator's law firm would be disqualified under subdivision (a)(~~4~~)(2) of section 170.1, the arbitrator is disqualified. Unless the ground for disqualification is disclosed to the parties in writing and is expressly waived by all parties in writing, the arbitrator must promptly notify the administrator of any known ground for disqualification and another arbitrator must be selected as provided in rule 1605.

(Subd (a) amended effective July 1, 2004; previously amended effective July 1, 1979, July 1, 1990, July 1, 2001, and January 1, 2004.)

(b)–(d) ***

Rule 1606 amended effective July 1, 2004; adopted effective July 1, 1976; previously amended effective July 1, 1979, July 1, 1990, January 1, 1994, July 1, 2001, and January 1, 2004.

Rule 1810. Complex case designation

A plaintiff may designate an action as a complex case by filing and serving with the initial complaint the *Civil Case Cover Sheet* (form ~~982.2(b)(1)~~ CM-010) ~~required by rule 201.8 that~~ is marked to indicate that the action is a complex case.

Rule 1810 amended effective July 1, 2004; adopted effective January 1, 2000; previously amended effective July 1, 2002.

Rule 1811. Complex case counterdesignations

- (a) **[Noncomplex counterdesignation]** If a *Civil Case Cover Sheet* designating an action as a complex case ~~was~~ has been filed and served and the court has not previously declared the action to be a complex case, a defendant may file and serve no later than its ~~his or her~~ first appearance a counter ~~civil case cover sheet~~ *Civil Case Cover Sheet* designating the action as not a complex case. The court ~~shall~~ must decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the ~~counter Civil Case Cover Sheet~~ counterdesignation.

(Subd (a) amended effective July 1, 2004.)

- (b) **[Complex counterdesignation]** A defendant may file and serve no later than its ~~his or her~~ first appearance a counter ~~Civil Case Cover Sheet~~ *Civil Case Cover Sheet* designating the action as a complex case. The court ~~shall~~ must decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the ~~counter Civil Case Cover Sheet~~ counterdesignation.

(Subd (b) amended effective July 1, 2004.)

- (c) ***

Rule 1811 amended effective July 1, 2004; adopted effective January 1, 2000.

Rule 1812. Action by court

- (a) **[Decision on complex designation]** Except as provided in rule 1811, if a ~~the~~ *Civil Case Cover Sheet* (~~Form 982.2(b)(1)~~) designating an action as a complex case ~~was~~ has been filed and served, the court ~~shall~~ must decide as soon as

reasonably practicable, with or without a hearing, whether the action is a complex case.

(Subd (a) amended effective July 1, 2004.)

(b) ***

Rule 1812 amended effective July 1, 2004; adopted effective January 1, 2000.

Rule 2061. Authorization for courts to continue modifying forms for the purpose of electronic filing and forms generation

Courts that participated in pilot projects for electronic filing and forms generation under rule 981.5 are authorized to continue to modify Judicial Council forms for the purpose of accepting electronic filing or providing electronic generation of court documents provided that the modification of the forms is consistent with the rules in this chapter.

Rule 2061 adopted effective July 1, 2004.

Rule 2073. Public access

(a) ***

(b) [Electronic access required to extent feasible] A court that maintains the following records in electronic form must provide electronic access to them, both remotely and at the courthouse, to the extent it is feasible to do so.

(1) Register of actions (as defined in Gov. Code, § 69845), calendars, and indexes in all cases; and

(2) All records in civil cases, except those listed in (c)(1)–(6).

(Subd (b) amended effective July 1, 2004.)

(c) [Courthouse electronic access only] A court that maintains the following records in electronic form must provide electronic access to them at the courthouse, to the extent it is feasible to do so, but may provide remote electronic access only to the records governed by (b)~~(1)~~:

(1)–(6) ***

(Subd (c) amended effective July 1, 2004.)

(d)–(h) ***

Rule 2073 amended effective July 1, 2004; adopted effective July 1, 2002.

Rule 4.102. Uniform bail and penalty schedules—traffic, boating, fish and game, forestry, public utilities, parks and recreation, business licensing

The Judicial Council of California has established the policy of promulgating uniform bail and penalty schedules for certain offenses in order to achieve a standard of uniformity in the handling of these offenses.

In general, bail is used to ensure the presence of the defendant before the court. Pursuant to Vehicle Code sections 40512 and 13103, bail may also be forfeited and such forfeiture may be had without the necessity of any further court proceedings and treated as a conviction for specified Vehicle Code offenses. A penalty in the form of a monetary sum is a fine imposed as all or a portion of a sentence imposed.

To achieve substantial uniformity of bail and penalties throughout the state in traffic, boating, fish and game, forestry, public utilities, parks and recreation, and business licensing cases, the trial court judges, in performing their duty under section 1269b of the Penal Code to ~~meet annually to~~ revise and adopt, ~~before the first day of January,~~ a schedule of bail and penalties for all misdemeanor and infraction offenses except Vehicle Code infractions, shall give consideration to the Uniform Bail and Penalty Schedules approved by the Judicial Council. The Uniform Bail and Penalty Schedule for infraction violations of the Vehicle Code shall be established by the Judicial Council in accordance with section 40310 of the Vehicle Code. Judges shall give consideration to requiring additional bail for aggravating or enhancing factors.

~~The judge who calls the annual meeting~~ After a court adopts a countywide bail and penalty schedule, pursuant to section 1269b of the Penal Code, the court shall, as soon as practicable ~~after the meeting,~~ mail a copy of the schedule to the Judicial Council with a report stating how the revised schedule differs from the council's uniform traffic bail and penalty schedule, uniform boating bail and penalty schedule, uniform fish and game bail and penalty schedule, uniform forestry bail and penalty schedule, uniform public utilities bail and penalty schedule, uniform parks and recreation bail and penalty schedule, or uniform business licensing bail and penalty schedule.

The purpose of this uniform bail and penalty schedule is to

- (1) show the standard amount for bail, which for Vehicle Code offenses may also be the amount utilized for a bail forfeiture in lieu of further proceedings; and
- (2) serve as a guideline for the imposition of a fine as all or a portion of the penalty for a first conviction of a listed offense where a fine is used as all or a portion of the penalty for such offense. The amounts shown for the misdemeanors on the boating, fish and game, forestry, public utilities, parks and recreation, and business licensing bail and penalty schedules have been set with this dual purpose in mind.

Unless otherwise shown, the maximum penalties for the listed offenses are six months in the county jail or a fine of \$1,000, or both. The penalty amounts are intended to be used to provide standard fine amounts for a first offense conviction of a violation shown where a fine is used as all or a portion of the sentence imposed.

Note [footnote supplied from Administrative Office of the Courts Rules Memorandum No. R-2(00)]:

Courts may obtain copies of the Uniform Bail and Penalty Schedules by contacting:

Court Operations Services Office of the General Counsel

Administrative Office of the Courts

455 Golden Gate Avenue

San Francisco, CA 94102-3660

(415) 865-7611

Fax (415) 865-4330

<http://www.courtinfo.ca.gov/reference>

Rule 4.102 amended effective July 1, 2004; adopted as rule 850 effective January 1, 1965; previously amended effective January 1, 1970, January 1, 1971, July 1, 1972, January 1, 1973, January 1, 1974, July 1, 1975, July 1, 1979, July 1, 1980, July 1, 1981, January 1, 1983, July 1, 1984, July 1, 1986, January 1, 1989, January 1, 1990, January 1, 1993, January 1, 1995, and January 1, 1997; renumbered and amended effective January 1, 2001.

Rule 4.310. Determination of presentence custody time credit

At the time of sentencing, the court shall cause to be recorded on the judgment or commitment the total time in custody to be credited upon the sentence under ~~Penal Code~~ sections 2900.5, 2933.1(c), and 2933.2(c). Upon referral of the defendant to the probation officer for an investigation and report under ~~Penal Code~~ section 1203(a)(b) or 1203(f)(g), or upon setting a date for sentencing in the absence of a

referral, the court shall direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time prior to the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report shall be heard at the time of sentencing.

Rule 4.310 amended effective July 1, 2004; adopted as rule 252 effective January 1, 1977; amended and renumbered as rule 472 effective January 1, 1991; amended and renumbered effective January 1, 2001.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

(a)–(j) ***

Advisory Committee Comment (~~2003~~ 2004)

“Base term” is the term of imprisonment selected under section 1170(b) from the three possible terms. (See section 1170(a)(3); *People v. Scott* (1994) 9 Cal.4th 331, 349.)

“Enhancement.” The facts giving rise to an enhancement, the requirements for pleading and proving those facts, and the court’s authority to strike the additional term are prescribed by statutes. See, for example, sections 667.5 (prior prison terms), 12022 (being armed with a firearm or using a deadly weapon), 12022.5 (using a firearm), 12022.6 (excessive taking or damage), 12022.7 (great bodily injury), 1170.1(e) (pleading and proof), and 1385(c) (authority to strike the additional punishment). Note: A consecutive sentence is not an enhancement. (See section 1170.1(a); *People v. Tassell* (1984) 36 Cal.3d 77, 90 [overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401].)

“Sentence choice.” Section 1170(c) requires the judge to state reasons for the sentence choice. This general requirement is discussed in rule 4.406.

“Imprisonment” is distinguished from confinement in other types of facilities.

“Charged” and “found.” Statutes require that the facts giving rise to all enhancements be charged and found. See ~~the comment to the definition of~~ section 1170.1(e).

Rule 4.420. Selection of base term of imprisonment

(a)–(e) ***

Advisory Committee Comment (~~2003~~)(2004)

~~As amended by Assembly Bill No. 476 (Stats. 1977, ch. 165), the~~ The determinate sentencing law authorizes the court to select any of the three possible prison terms even though neither party has

requested a deviation from the middle term by formal motion or informal argument. Section 1170(b) ~~retains the requirement~~ requires, however, that the middle term be selected unless there are circumstances in aggravation or mitigation of the crime, and requires that the court set forth on the record the facts and reasons for imposing the upper or lower term.

Thus, the sentencing judge has authority to impose the upper or lower term on his or her own initiative, if circumstances justifying that choice appear upon an evaluation of the record as a whole.

The legislative intent is that, if imprisonment is the sentence choice, the middle term is to constitute the average or usual term. The rule clarifies this intent by specifying that the presence of circumstances justifying the upper or lower term must be established by a preponderance of the evidence, and that those circumstances must outweigh offsetting circumstances. Proof by a preponderance of the evidence is the standard in the absence of a statute or a decisional law to the contrary (Evid. Code, § 115), and appears appropriate here, since there is no requirement that sentencing decisions be based on the same quantum of proof as is required to establish guilt. See *Williams v. New York* (1949) 337 U.S. 241.

Determining whether circumstances in aggravation or mitigation preponderate is a qualitative, rather than a quantitative, process. It cannot be determined by simply counting identified circumstances of each kind.

Present law prohibits dual punishment for the same act (or fact) but permits the same act or fact to be considered in denying probation and in selecting the upper prison term. *People v. Edwards* (1976) 18 Cal.3d 796 (prior felony conviction, an element of the offense, also brought defendant within former section 1203(d)(2) limitation on probation to person with prior felony convictions), citing *People v. Perry* (1974) 42 Cal.App.3d 451, 460, and other cases.

The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used in aggravation.

Note that under rule 4.425(b), a fact used to impose the upper term cannot be used to impose a consecutive sentence.

People v. Riolo (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does not require the judgment to set forth the base term (upper, middle, or lower) and enhancements, computed independently, on counts that are subject to automatic reduction under the one-third formula of section 1170.1(a).

Even when sentencing is pursuant to section 1170.1, however, it is essential to determine the base term and specific enhancements for each count independently, in order to know which is the principal term count. The principal term count must be determined before any calculation is made using the one-third formula for subordinate terms.

In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at an informed decision whether to make terms consecutive or concurrent; and the base term for each count must be stated in the judgment when sentences are concurrent or are fully consecutive (i.e., not subject to the one-third rule of section 1170.1(a)).

Rule 4.428. Criteria affecting imposition of enhancements

(a)–(b) ***

Advisory Committee Comment (2003 2004)

Subdivision (b) is intended to apply to all enhancements punishable by three possible terms (section 1170.1(d)). This rule applies both to determinate and indeterminate terms.

Rule 4.431. Proceedings at sentencing to be reported

All proceedings at the time of sentencing shall be reported.

Advisory Committee Comment (2003 2004)

Reporters' transcripts of the sentencing proceedings are required on appeal (rule ~~33(a)(2)~~ 31(c)(8)), and when the defendant is sentenced to prison (section 1203.01).

Rule 4.447. Limitations on enhancements

No finding of an enhancement shall be stricken or dismissed because imposition of the term is either prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed.

Advisory Committee Comment (2003 2004)

Statutory restrictions may prohibit or limit the imposition of an enhancement in certain situations. (See, for example, sections 186.22(b)(1), 667(a)(2), 667.61(f), 1170.1(f) and (g), 12022.53(e)(2) and (f), and Vehicle Code section 23558.)

Present practice of staying execution is followed to avoid violating a statutory prohibition or exceeding a statutory limitation, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence. See *People v. Niles* (1964) 227 Cal.App.2d 749, 756.

Only the portion of a sentence or component thereof that exceeds a limitation is prohibited, and this rule provides a procedure for that situation. This rule applies both to determinate and indeterminate terms.

***Corrections to Rule Histories:**

Rule 1257.4 [Renumbered 2003]

Rule 1257.4 renumbered rule 5.225 effective January 1, 2003; adopted effective January 1, 2002.

Rule 5.225. Education, experience, and training standards for court-appointed child custody investigators and evaluators

(a)–(o) ***

Rule 5.225 renumbered effective January 1, 2003; adopted as rule 1257.4 effective January 1, 2002.